

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 14,166

)

Appeal of )

)

INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) substantiating a report of child abuse against her and, as a result, revoking her registration to operate a family day care in her home. The issue is whether the Department's decision is supported by a preponderance of the evidence.

FINDINGS OF FACT

The petitioner has operated a family day care out of her home for several years. On October 30, 1995, she was caring for several children, including a two-and-a-half-year-old girl who is the subject of this action. When the child's mother dropped her off early that morning she told the petitioner that the child was cranky and had not slept well the previous night. The petitioner suggested that the mother take the child to the doctor later that day.

The mother returned to the petitioner's day care later that morning and took the child to the doctor. When she returned, about 11 A.M., she told the petitioner that the child had several canker sores in her mouth that were making her uncomfortable. After the mother left, the child was whiny and irritable. She didn't eat much lunch and would not nap afterward with the other children.

According to the petitioner, <sup>(1)</sup> she put the child down to nap in a room (the bedroom of the petitioner's teenage daughter) by herself in hopes that she would settle down and not disturb the other children. At first the child appeared to calm down, but after a few minutes the petitioner heard her scream out, and went to see what was the matter.

The petitioner states that when she came into the room the child had pushed her leg through the cracked bottom of a plastic recycling basket that the petitioner had not noticed had been in the room. The basket was stuck on the child's upper leg over her long pants. The petitioner freed the basket from the child and everything seemed to be all right.

The petitioner testified that later in the afternoon, however, she was changing the child's diaper and

noticed that there were red bruise marks on the child's leg. The petitioner assumed these had been caused by the basket.

At about 4 p.m. that day the child's grandfather and aunt (with whom the child and her mother lived) came to pick up the child. The petitioner told them about the basket incident and that the child had a bruise on her leg.

Later that evening, however, the child's grandparents looked at the bruise and apparently concluded that it looked like the child had been slapped by a human hand. When the mother returned home that evening from work her parents showed her the bruise.

The mother testified that the child told her that, "Katie did it". The mother called an uncle who works for a local police department who advised her to take the child in to the police station. At about 9:30 that evening the mother did so, where the police took pictures of the child's injury before sending them home for the night. The police advised the mother to have the child examined by a doctor.

At about 11 A.M. the next morning, after taking the child to the doctor, the mother and the child returned to the police station to meet with an investigator from SRS. More pictures were taken at this time.<sup>(2)</sup> The child repeated that, "Katie did it", when she was asked how she had gotten the bruise. There is no indication or allegation that the injury to the child was anything more than some red marks on her leg that lasted a few days, or that the child suffered any lingering pain or discomfort from the injury.

The SRS investigator obtained a faxed statement from the child's doctor that consists of a sparse and only-partially-legible office note of October 31, 1995, that includes the statements, "bruise upper leg noted last p.m." and "imprint of hand fingers".

The SRS investigator did not contact the doctor. She concluded from the doctor's statement, however, and from her own observation that the bruise had been caused by a hand slap.

The next day, the SRS investigator went to the petitioner's home to interview her about the incident. The petitioner explained that the child had stepped through the plastic basket and that she (the petitioner) had then put the basket out for the trash collector. SRS disbelieved the petitioner, and concluded from its investigation that the petitioner had intentionally slapped the child in the leg causing the bruise in question.

At the hearing the petitioner presented a statement from her trash collector (obtained shortly after SRS's visit to her house) that on November 1, 1995, he had picked up a plastic recycling basket that was split on the bottom. The petitioner also testified that the children at her day care call her "Mrs. (Surname)", and that only a few people call her "Katie". Curiously, the child's mother testified that she, herself, usually calls the petitioner "Kathy", and only sometimes refers to her as "Katie". This lends considerable credence to the petitioner's contention that the child was led or coached what to say to the police and the investigator. The mother's testimony that neither she nor her parents led or suggested to the child that the petitioner did it was not deemed convincing.<sup>(3)</sup>

Each and every other parent who has a child at the petitioner's day care either testified at the hearing or provided a written testimonial as to their belief that the petitioner would not strike a child in her care and their support for the petitioner in this matter. Although none of these individuals was present when the

incident allegedly occurred, they all struck the hearing officer as credible observers of character due to their clear concern and devotion to providing safe and nurturing care for their children. The petitioner, herself, struck the hearing officer as an honest and candid witness and a caring and insightful child care provider. Her testimony was deemed credible.

The Department's case, on the other hand, was less than persuasive. As noted above, the SRS investigator never saw fit to even contact the child's doctor, and there was no medical evidence presented other than the doctor's cursory office note. It is unclear to the hearing officer, however, whether the office note is even describing the doctor's actual medical "opinion" of the origin of the child's bruise or merely reporting what the child's mother told him about it. Given this lack of clarity, and the fact that the note is unsupported hearsay, it is not deemed sufficient to carry the Department's burden of proof that the child's injury was, in fact, caused by a human hand slap--much less one from the petitioner.

The Department is left with the photographs of the bruise and its investigator's inexperienced opinion that the bruise appears to be a human hand slap. Although the photographs show what could be described as an "outline" of human fingers on the child's thigh, there may well be several other plausible explanations for such bruises.

Without more conclusive medical evidence as to the origin of the child's bruises, it cannot be found that they were caused by the petitioner slapping the child. As noted above, the petitioner's testimony and demeanor were credible. The Department's evidence was not deemed sufficient to overcome that credibility.

Based on the evidence presented it cannot be found that the child was injured by a human hand slap or any other intentional or culpably negligent act of the petitioner.

### ORDER

The Department's decision to revoke the petitioner's day care home registration is reversed and the report of this incident shall be expunged from the Department's child abuse registry. The Department's decision to revoke the petitioner's family day care home registration is reversed.

### REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

...

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application

at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the Department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Department has the burden of demonstrating by a preponderance of the evidence that the petitioner abused the child in question. In re Bushey-Combs, 160 Vt. 326 (1993). As noted above, the Department in this case has not met that burden, and the report in question shall, therefore, be expunged from the Department's child abuse registry.

The Department's decision to revoke the petitioner's day care home registration was based entirely on its "substantiation" of the report of the petitioner slapping the child in question. The parties agree that Board's determination as to the substantiation of the alleged slapping incident will be dispositive of the question of whether the petitioner's registration to operate a family day care home should be revoked. See SRS Regulations for Family Day Care § III(4). Inasmuch as it cannot be concluded that the petitioner slapped or otherwise abused the child in question, the Department's decision to revoke the petitioner's family day care home registration is reversed.

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1. The petitioner was not represented by an attorney in this matter.
2. Two of the photographs taken were introduced as evidence.
3. The mother admitted she was not present for several hours after her parents had first looked at the child's bruises. SRS did not interview the child's grandparents during its investigation, and the grandparents were not at the hearing.